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of Embezzlement was passed in England, under which a prisoner, who would escape under the technicalities of the law of larceny, might be convicted. See 6 HARVARD LAW REVIEW, 244.

PRESCRIPTIVE RIGHT TO COMPEL REPAIRS. — A somewhat startling proposition in the law of easements is laid down in the case of *Whittenton Manufacturing Co.* v. *Staples*, 41 N. E. R. 441 (Mass.), FIELD, C. J., HOLMES and LATHROP, JJ., dissenting. It is to the effect that, in consequence of payment by owners of land for more than twenty years of an annual sum of money toward the repair of the dam situated off the premises, the land thereby becomes subject to a servitude to pay that sum annually. The decision is based on the analogy of the duty to repair a dam to the duty to repair fences and highways. The primary conception of an easement is a right to use another's land: it is a burden imposed upon the land itself, and gives the owner of the easement a right *in rem*. The duty of the owner of the servient estate is the same as that of all other members of the community, merely to refrain from interfering with the use of the easement. Unfortunately, the law has allowed a landowner to acquire by prescription, or by grant, certain rights, which are not accurately rights in the land of another compelling a passive duty of non-interference merely, but are rights compelling positive acts by the dominus of the servient estate.

In these cases, the land is not subjected to use, but the owner, by reason of holding the land, is compelled to do positive acts. A right to compel the performance of positive acts is known as a spurious easement: and up to this time has been strictly confined to three classes of cases. The law has recognized the right to compel the repair of fences; repairs in connection with the enjoyment of an existing easement (*Ryder* v. *Smith*, 3 T. R. 766); and repairs to be made upon the highway by abutting owners (Bac. Abr., Highways, E.). It is doubtful if the last mentioned right was ever recognized in the United States previously to the decision in the recent case of *Middlefield* v. *Knitting Co.*, 160 Mass. 267. The question in the principal case concerns the extension of these exceptional easements. There are two strong objections. In the first place, the analogy between repairs on a dam situated on the land of a stranger and repairs to fences and highways is not complete. In each of the spurious easements noted above, acts are to be done on the servient estate; or at least, in each case the act to be done is closely bound up with the use of his land by the owner of the servient estate. But, aside from this imperfect analogy, the creation of rights in the nature of easements — varying widely, however, from the primary conception of easements, that of a subjection of the land itself — has gone far enough. It is to be regretted that such rights — anomalies at best — were ever allowed to creep into the law; and on principle they ought not to be extended beyond their present well defined limits. It is conceivable, perhaps, that strong reasons of public policy would justify the extension which the court tries to make in the present case; but Field, C. J., in his dissenting opinion, forcibly replies to arguments of this nature that "secret liens or interests in land, a knowledge of which cannot be obtained by a view of the land itself, or by a search in the proper registry of deeds, ought not to be extended." With authority and reasons of public policy against the decision, it has little left to support it.

The Massachusetts court would certainly support a covenant to pay this

money, even though in so doing it would probably go beyond the doctrine of *Savage* v. *Mason*, 3 Cush. 500. There, the covenant was to pay for the privilege of using a party wall, and was connected, it would seem, with the enjoyment of an easement, in this case, a right to retain the wall on land of the covenantor and his assigns.

WAIVER OF CONSTITUTIONAL RIGHT TO TWELVE JURORS. — The Supreme Court of New Mexico has just decided that the United States constitutional guaranty of a jury trial in all criminal prosecutions cannot be waived by one indicted for a felony, so as to make valid a trial by eleven jurors. *Territory* v. *Ortiz*, 42 Pac. Rep. 87.

Most of the American State constitutions contain similar guaranties, which have been generally interpreted to prohibit statutes compelling the defendant to submit to trial by any number of jurors less than twelve. As regards the defendant's ability to waive this right, the authorities are divided. Although in minor offences the defendant is generally allowed to waive the right even in the absence of statutes permitting it, he is not allowed at common law to waive the right in case of felonies; and statutes permitting waiver of the right in such case are in some States held unconstitutional. Nowhere is waiver of this right permitted in capital cases.

One argument suggested against allowing the defendant to waive his constitutional right to a trial by a full panel has been that the State is concerned to preserve the lives and liberties of its citizens, and therefore it will not suffer them to consent to a form of procedure that may lessen their chances of acquittal. *Cancemi* v. *People*, 18 N. Y. 128. But in *Comm.* v. *Dailey*, 12 Cush. 80, Chief Justice Shaw points out that in any particular case the defendant's chances of success in a present trial with eleven jurors may be greater than in a future one with twelve, as where certain evidence is now available that may not be in the future; and that the defendant and his counsel can be safely trusted not to prejudice his interests. Judge Cooley contends, however, upon better ground, that a tribunal of less than twelve jurors is unknown to the law; that it amounts merely to a species of arbitration to decide whether the accused has been guilty of an offence against the State. Cooley, Const. Lim. (6th ed.) 391. The finding of such a tribunal, not constituted according to law, is of course shorn of legal effect. Bulwarked by this reasoning, the result of the principal case and kindred decisions seems fairly impregnable.

THE NATURE OF RAILROAD TICKETS. — Two recent cases in minor courts bring up interesting questions concerning the nature of railroad tickets. In *Evansville & T. H. R. R. Co.* v. *Cates*, 41 N. E. Rep. 712, the Appellate Court of Indiana held that where a passenger demands and pays for a ticket to A, and by a mistake of the ticket agent is given a ticket to B only, with which he enters the train without noticing the error, he has a right to ride to A on making proper explanation to the conductor; and can recover from the company for ejection by the conductor at B. This case is not without support (see *Georgia R. R., &c., Co.* v. *Dougherty*, 86 Ga. 744; 3 Wood on Railroads, § 349); but the weight of authority is against it, and it seems to have no foundation in principle. It involves a misconception of the true character of a railroad ticket. If it were true that the